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No. 85-490

In The

Supreme Court of the United States

October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,
Petitioners,

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Do former members of a pension plan who elected to receive lump sum benefits in lieu of monthly benefits on retirement continue to be "participants" within the intendment of 29 USC 1002(7) and 1132?

II.

Does a substantial and material dispute exist among the Circuit Courts of Appeal sufficient to require this Court to accept certiorari in the present matter?

III.

Have plaintiffs waived their right to request that defendants be compelled to submit to arbitration by invoking the jurisdiction of the federal court, requesting relief on the merits, and failing to request that defendants be compelled to arbitrate in any of the previous proceedings?

LIST OF ALL PARTIES TO THE PROCEEDING

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Bernard Raynal,
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

29 USC 1002(7)

29 USC 1132

29 USC 1002(22)

29 USC 1002(23)

29 CFR 2610.2

STATEMENT OF THE CASE

As stated by applicants, the only significant issue presented concerns the threshold determination of federal court subject matter jurisdiction under the Employees Retirement Income Security Act, 29 USC 1001, et seq. The particular question involves whether plaintiffs qualify as "participants" as defined by 29 USC 1002(7), (Appendix A). Under ERISA, status as a "participant" is determinative of both subject matter jurisdiction and standing. 29 USC 1132 (Appendix B).

The plaintiffs in the present matter are retired members of the New Orleans Electrical Pension and Retirement Plan. Each plaintiff voluntarily elected to accept a lump sum retirement benefit in lieu of continuing monthly benefits at some time before January 1, 1981. In fact, the lead plaintiff, Mr. Melbourne Joseph, retired approximately five years prior to that date.

The basis for applicants' present complaint is an amendment to the Plan which increased the benefits payable to members retiring on or after January 1, 1981. The Plan was amended July 29, 1981, but the increase in benefits was made retroactive to January 1, 1981. Those members accepting a lump sum retirement benefit between January 1, 1981 and July 29, 1981 were extended the increased benefits under the Plan amendment.

Contending that the defendants had breached duties owed to them under ERISA, the plaintiffs filed this action in the United States District Court for the Eastern District of Louisiana. The sole basis for subject matter jurisdiction was predicated upon 29 USC 1132 which provides a federal forum for a participant's civil action to

recover benefits due him under the Plan, to enforce his rights under the terms of the Plan, or to clarify his rights to benefits.

Defendants answered the petition and filed a motion to dismiss the complaint contending that as a matter of law the federal court lacked subject matter jurisdiction, the plaintiffs lacked standing and the petition failed to state a cause of action upon which relief could be granted. The basis for this motion was defendants' contention that plaintiffs did not qualify as "participants" under 29 USC 1002(7), and 1132.

Briefs were filed on behalf of both plaintiffs and defendants, and oral arguments were presented to the District Court on February 1, 1984. At that time, the court granted defendants' motion to dismiss and assigned oral reasons.

Plaintiffs perfected an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit concluded that the plaintiffs were not "participants" and affirmed the trial court's decision. *Joseph, et al v. New Orleans Electrical Pension and Retirement Plan,* 754 F.2d 628 (5th Cir. 1985).

Plaintiffs subsequently filed a petition for a panel rehearing and en banc consideration. This request was denied by the Fifth Circuit on April 22, 1985. Plaintiffs have now applied for a writ of certiorari. Defendants contend that certiorari is not necessary in the present case and oppose plaintiffs' request.

———o———

REASONS FOR DENYING PLAINTIFFS' PETITION

The District Court For The Eastern District of Louisiana And The United States Court of Appeals For The Fifth Circuit Were Correct In Determining That Plaintiffs Were Not "Participants" Within The Intendment Of 29 USC 1002 (7) And 1132

As previously stated "participant" status under 29 USC 1002(7) is the central issue to the present controversy. Status as a participant is determinative of federal court subject matter jurisdiction and standing. *Kerbow v. Kerbow,* 421 F.Supp. 1253 (N.D. Tex. 1976); 29 USC 1132. In federal courts, as courts of limited jurisdiction, these determinations must be made before the court may proceed toward a trial on the merits.

This Court has previously recognized that the purpose of ERISA, 29 USC 1001, et seq., was to insure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of the pension plan before sufficient funds could accumulate. *Pension Guaranty Corp. v. Gray & Co.,* 467 U.S. 104 (1984). In *Gray & Co., supra,* this Court was particularly concerned that any defined pension benefit promised to an employee be paid upon retirement.

This rationale had previously been applied by the lower federal courts in such decisions as *Pompano v. Schiavone & Sons, Inc.*, 680 F.2d 911 (9th Cir. 1982), in which the court stated that ERISA's purpose was to "secure guaranteed pension payments to participants by insuring the honest administration of a financially sound plan". *Id.* at 914.

The lower federal courts have also recognized the extremely onerous obligations and duties which ERISA imposes upon retirement plans towards participants. In *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980), the court pointed out that participant status must necessarily be limited in order to protect pension plans from the harrassment which could result from the extension of these obligations to persons who had no need of their protection. *Id.* at 1287.

In order to establish this necessary limitation, ERISA contains the following definition of "participant":

> "Any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." 29 USC 1002(7).

While the question of subject matter jurisdiction under ERISA, particularly regarding participant status, has not been the subject of widespread litigation, decisions rendered thus far by the federal courts overwhelmingly support defendants' position.

One of the most frequently cited cases regarding participant status under ERISA is *Nugent v. Jesuit High*

School of New Orleans, 625 F.2d 1285 (5th Cir. 1980). In that case, the plaintiff was employed as a teacher for the Jesuit High School of New Orleans for three years. Since she was over 25 years old she was qualified as a participant in the school's pension plan while employed; however, she did not meet the minimum vesting period of five years employment under the plan. After termination, the plaintiff brought an action against the plan seeking disclosure of the total benefits accrued and the portion, if any, which had become vested. Additionally, she sought statutory penalties and attorney fees for the failure of the plan to provide the information as required by ERISA. The defendant plan sought and was granted a summary judgment on the ground that the plaintiff was not a participant and the court, therefore, lacked subject matter jurisdiction.

As in the present case, Nugent's claim to participant status was based upon the "may become eligible" language contained in 29 USC 1002(7). Nugent argued that there was always the possibility that she would be rehired at some later date and meet the vesting requirement prior to her retirement. The court analyzed this possibility, and in light of the purposes of ERISA determined Congress' intent was that the "may become eligible" language applied only to current non-vested employees.

In effect, the Fifth Circuit in *Nugent* described three classes of persons who qualified as "participants": (1) a current employee whose benefits had not yet vested since he would become eligible to receive a benefit in the future by acquiring enough tenure for vesting to occur, (2) a current employee whose benefits had already become vested, and (3) a former employee who was terminated after

having acquired vested benefits since at retirement the vested benefits would actually be paid. Clearly, persons who have retired and received the extent of their vested benefits such as plaintiffs do not fall into any of the categories of "participants" established by the Fifth Circuit in *Nugent.*

In *Yancey v. American Petrofina, Inc.,* 597 F.Supp. 498 (E.D. Tex., Beaumont Div. 1984), the court was presented with a case almost identical to the present situation. Plaintiff Yancey was an employee who had elected to retire early and accept a lump sum payment on March 1, 1982. Previously, on January 23, 1982 Mr. Yancey had been notified of a plan amendment which would have had the effect of substantially reducing lump sum benefits accepted after March 1, 1982.

After accepting his lump sum benefit, Mr. Yancey sued the plan contending that the trustees had breached their fiduciary duty, forcing him to retire early to avoid reduction of lump sum benefits and resulting in a net loss of income. While the court found the facts of the *Nugent* case to be dissimilar, it held that logic compelled the result that Mr. Yancey was not a "participant". Significantly, the court found the "may become eligible" language applied only to a former employee with a *non-forfeitable definite sum due him.* In finding that this rationale did not apply to the plaintiff, the court stated:

> "Neither can this court regard Yancey as a former employee who has yet to receive benefits. When Yancey retired on March 1, 1982, he received in a lump sum form all of the vested benefits that were due him under the plan." *Id.* at 493.

Similarly, in the present case plaintiffs received their entire lump sum benefit to which they were entitled under the Plan as it existed at the time of their retirement. At the time this suit was initiated, plaintiffs had no "non-forfeitable definite sum" due them.

In *Freeman v. Jacques Orthopedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), the Ninth Circuit Court of Appeal had the opportunity to analyze at length the basis for participant status. In that case, the plaintiff had validly waived any right to participate in the plan but sued contending that he had been misled by the trustees as to the cost of participation; therefore, the waiver was invalid. The court ultimately found it lacked subject matter jurisdiction as Mr. Freeman was not a "participant".

The basis for the court's decision was that no contributions had ever been made to the plan by or on behalf of Mr. Freeman; therefore, the protection of ERISA in granting a "participant" a federal forum to protect his interest in the pension fund was totally unnecessary. Clearly, the present plaintiffs are not dissimilar to Mr. Freeman. At the time of defendants' action, and indeed at the present time, they are not participants as no contributions remain in the Plan on their behalf. By plaintiffs' own actions, all contributions were voluntarily removed from the Plan.

In addition to the jurisprudence, it is clear that the Department of Labor would not regard the present plaintiffs as "participants". The Code at 29 C.F.R. 2610.2 provides that the definition of "participant" does not include, " . . . an individual to whom an insurance company

has made an irrevocable committment to pay all the benefits to which the individual is entitled under the plan . . . . " (Appendix C). Once the former employee has received an irrevocable committment from a third party insurance company to pay his monthly benefits, he no longer has a financial interest in the administration of the plan. If, as in the present case, the former employee has actually received all of his benefits in a lump sum, he has even less reason to complain.

When the plan turns the former employee's benefits over to an insurance company who purchases an annuity to produce monthly benefits, the Department of Labor no longer considers the employee a "participant". Similarly, where the benefits are turned over to the employee himself, who may then invest those benefits in any manner in which he sees fit, he would no longer be regarded as a participant. As this Court has previously recognized, substantial deference must be given to the construction of a statute by the agency charged with enforcing it. *United States v. Rutherford,* 442 U.S. 544 (1979).

Plaintiffs' sole claim to participant status is the bootstrap argument that they may become eligible to receive a benefit if a court ultimately finds in their favor. This was the identical position adopted by the plaintiff in *Freeman, supra;* however, the court had no trouble in dismissing this argument.

The Ninth Circuit correctly distinguished "benefits" from damages which the plaintiffs might recover. Under ERISA, "benefits" are the returns payable to a participant from the administration of his contributions by the plan. 29 USC 1002(22) and (23), (Appendix D). The court held that where the plan administered no contribu-

tions on behalf of the plaintiff, any recovery awarded to him must necessarily be an award of damages, not "benefits".

The court succinctly explained that an award of damages could not have the effect of making the plainitff a participant, stating:

> "This court cannot rewrite history and declare that he [plaintiff] did participate. At most, this court, or any court for that matter, could award Freeman the damages caused by the alleged fraud. This is different from awarding him a 'benefit under a plan'. If it were not, then any plaintiff who could argue a colorable claim would be a participant, since a victorious lawsuit would award him a 'benefit'." *Freeman, supra* at 721.

Throughout the course of this litigation it has been undisputed that all plaintiffs retired and elected to receive their lump sum benefit in lieu of continuing monthly benefits prior to the effective date of the Plan amendments, January 1, 1981. Therefore, no contributions made by or on behalf of the plaintiffs remained in the Pension Fund at the time the Plan was amended, or on the retroactive effective date of the amendments.

An examination of the applicants' petition reveals the basis of their complaints to be that certain lump retirees, those retiring between Janaury 1, 1981 and July 29, 1981, were accorded a gratuity which was not given to plaintiffs. While defendants believe that they had sufficient reasons to act in the manner in which they did, it is clear that plaintiffs have no standing to complain of defendants' actions.

In analyzing this matter with regard to congressional intent, application jurisprudence and Department of Labor

interpretations, it is clear that plaintiffs do not qualify as participants; therefore, there is no federal court subject matter jurisdiction provided under ERISA. At the time of the Plan amendments and the present lawsuit, defendant pension plan administered no contributions on behalf of the plaintiffs and, therefore, they do not fall within a class of persons who Congress intended to protect in adopting ERISA.

Further, the plaintiffs fail to qualify as participants under any of the tests established by the jurisprudence. They do not fall within any of the classes of participants as defined in *Nugent, supra,* nor can they show that they are entitled to a non-forfeitable definite sum from the Plan as required by *Yancey, supra.* Finally, analyzing the matter under the *Freeman* decision, it is clear that the plaintiffs, if successful, would not become eligible to receive a benefit but simply an award of damages from defendants. This is insufficient to establish participant status and subject matter jurisdiction under ERISA.

Undeniably, the overwhelming weight of authority supports the action of both lower courts in dismissing the present matter.

There Exists No Divergence Of Authority Among The Circuit Courts Of Appeal And District Courts Requiring This Court's Attention

The plaintiffs' attempt to establish a need for this Court's attention primarily by pointing out decisions of the United States Court of Appeal for the Ninth Circuit. They contend that these decisions can not be harmonized with the cases from the Fifth Circuit or even with each other. Actually, the cases are easily explicable in light of the underlying purpose of ERISA.

Plaintiffs first refer to the decision of *Bricklayers' Health & Welfare Trust Fund of the Inland Empire, San Bernadino & Riverside Counties v. Brick Masons' Health & Welfare Trust Fund,* 656 F.2d 1397 (9th Cir. 1981). In the *Bricklayers* case, the plaintiffs were former members of defendant plan. They decided that their interests would be better served by having their own pension plan and withdrew from the defendants' plan. The basis of the suit was plaintiffs' claim against their former plan to receive their contributions and accumulated benefits to reinvest into the new pension plan.

While the court did refer to the plaintiffs as "former participants", it is clear from analyzing the decision that the actual relevant status of the plaintiffs would have been "former members", category (3) under the *Nugent* analysis. The court made no determination as to their status as "participants". In fact, the nature of the suit illustrates that plaintiffs were still "participants under the ERISA definition since they were suing for contributions made by them or on their behalf that had been retained by the first plan.

Another case, *Freeman v. Jacques Orthopedic Joint Implant Surgery Medical Group, Inc., supra,* is relied upon by plaintiffs as establishing a split of authority among the cases from the Ninth Circuit. As previously pointed out, the *Freeman* decision undeniably supports defendants' present position. The key to the court's decision in denying subject matter jurisdiction was the fact that no contributions made by or on behalf of the plaintiff were retained in the fund at the time of the plaintiff's suit. Although the plaintiff had a complaint regarding the conduct of the trustees, federal court jurisdiction under ERISA

was not necessary as the plan administered no contributions on behalf of the plaintiff.

Considering the Congressional purpose in establishing ERISA, the results in both the *Freeman* and the *Bricklayers* decisions are exactly as expected.

The plaintiffs next rely on another Ninth Circuit decision, *Weiss v. Sheetmetal Workers Local No. 554 Pension Trust,* 719 F.2d 302 (9th Cir. 1983), as establishing a split between the United States Courts of Appeal for the Ninth Circuit and the Fifth Circuit. Contrary to plaintiffs' statements in their writ application, the Ninth Circuit did not specifically reject the *Nugent* analysis in the *Weiss* decision.

In *Weiss* the plaintiff did not claim entitlement to a pension, nor did he even make a showing that he had met the minimum vesting requirements under ERISA. The court specifically found that the plaintiff had failed to make even a prima facie showing that he qualified as a "participant". The court was cognizant of the *Nugent* decision but specifically found that due to the plaintiff's lack of any showing of an entitlement to participant status it was not necessary for the court to go as far as the Fifth Circuit in *Nugent.* Clearly this does not establish a specific rejection of the *Nugent* analysis by the Ninth Circuit. The result reached was again totally consistent with that analysis and the Congressional purpose in establishing ERISA.

Plaintiffs' reference to the case of *Chase v. Trustees of the Western Conference of Teamsters Pension Trust Fund,* 752 F.2d 744 (9th Cir. 1985), utterly fails to establish any indecision within the Ninth Circuit concerning

participant status. In fact, the only question presented with regard to participant status was whether the plaintiffs were employees or independent contractors. The court simply determined that a remand for additional evidence was necessary.

Plaintiffs also attempt to establish an inconsistency within the Fifth Circuit by pointing out the decision of *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir. 1981). In *Paris*, plaintiffs were employees who had been terminated between the dates on which the plan was adopted, February 21, 1974, and the date on which it was retroactively instituted, June 1, 1973. Additionally, because of the dates which were involved the court was faced with significant problems involving the effective date of ERISA itself. The court found that this unique situation created substantial uncertainty over whether the plaintiffs were "participants". However, despite this confusion, the court ultimately determined that the plaintiffs had no claim since the plan administered no contributions for them.

In any event, the present matter is materially dissimilar from that presented in *Paris*. In the present case, the plaintiffs all retired *prior* to the retroactive effective date of the Plan amendments. Not one of the forty-nine plaintiffs claims that he was an employee in the interim period between the retroactive effective date, January 1, 1981, and the date on which the Plan was amended, July 29, 1981.

The district court opinions cited by the plaintiffs do not indicate that the lower federal courts are having any difficulty understanding the basis for participant status and applying the rationale of the circuit courts of appeal.

As previously stated, the court in *Yancey, supra,* concluded that a lump sum retiree lacked participant status. This is easily understood since the Plan no longer maintains or administers any contributions made by or on behalf of that employee.

The factual situation presented to the court in *Stewart v. National Shopmen Pension Fund,* 563 F.Supp. 773 (D.C. 1983), presented no real issue of participant status; however, the court's analysis indicated that it was completely familiar and able to apply the Congressional intent. The court was able to make a subtle distinction between "employees" and "participants" under ERISA indicating that it was having no difficulty interpreting the various decisions from the courts of appeal.

Even looking at the one sentence regarding *Folz v. Marriott Corp.,* 594 F.Supp. 1007 (W.D. Mo. 1984) included within the plaintiffs' brief, "former employee who was a participant at the time of his termination had standing under ERISA 'to recover benefits due him . . ., to enforce his rights . . ., or to clarify his rights to future benefits . . . '", establishes its consistency with other decisions. Obviously, none of the previous decisions have denied that a former employee for whom the fund retains contributions would have standing to utilize the rights accorded to "participants" under ERISA.

This review of the jurisprudence is sufficient to illustrate that the lower federal courts are not having difficulty in determining Congressional intent in situations similar to the present matter and in applying that intent in a consistent and well-reasoned manner.

The decisions of the Ninth Circuit regarding participant status under ERISA are not only internally consistent but also are consistent with and support the rationale expressed by the Fifth Circuit in the *Nugent* decision.

Defendants contend, therefore, that there is no present necessity for the Court to further review this matter.

The Plaintiffs Have Waived Any Right Which They May Have Had To Compel Defendants To Arbitrate The Present Matter By Actively Engaging In The Present Litigation

The plaintiffs have for the first time throughout the course of this litigation requested that this Court compel the defendants to submit to arbitration. Plaintiffs chose to bring this action in the Federal District Court requesting the court rule on the merits of their claim.

It is well established that the right to compel arbitration may be waived by actively engaging in litigation. *Commercial Union and Metal Co. v. Bache Halsey Stewart, Inc.*, 581 F.2d 246 (10th Cir. 1978); *N & D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1976); *E. C. Ernst, Inc. v. City of Tallahassee*, 527 F.Supp. 1141 (N.D. Fla., Tallahassee Div. 1981); *Lubrizol International SA v. M/V Stolt Argobay*, 562 F.Supp. 565 (S.D. N.Y. 1982); *Weiland v. Pyramid Ventures Group*, 511 F.Supp. 1034 (M.D. La. 1981). Clearly, the plaintiffs' action in seeking out a federal forum and requesting that the court rule on the merits of their claim waived any right to compel defendants to arbitrate.

———o———

CONCLUSION

Respondents submit that Congressional intent, the jurisprudence, and the Department of Labor interpretations are consistent and require a finding that plaintiffs are not "participants" within the intendment of 29 USC 1002(7) and 1132. Therefore, the actions of both the Federal District Court for the Eastern District of Louisiana and the Court of Appeal for the Fifth Circuit are undeniably correct since the plaintiffs lack standing to bring the present suit and the courts themselves lack subject matter jurisdiction.

Additionally, plaintiffs' own actions in filing a complaint in the District Court seeking relief on the merits and failing to request that defendants be compelled to arbitrate has effected a waiver of any right which the plaintiffs may have had to compel such arbitration.

Therefore, this Court should deny plaintiffs' petition for a writ of certiorari.

Dated the 31 day of October, 1985.

Respectfully submitted,

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APPENDIX "A"

"(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

APPENDIX "B"

"A civil action may be brought

(1) by a participant or beneficiary

(a) for the relief provided for in subsection (c) of this section, or

(b) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-chapter or the terms of this plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) Except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

APPENDIX "C"

"(a)(2) Any non-vested individual who is not currently in employment covered by the plan but who is earning or retaining credited service under the plan. This category does not include a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan.

(b) Inactive

(b) (1) inactive receiving benefits

Any individual who is retired or separated from employment covered by the plan and who is receiving benefits under the plan. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(b) (2) Inactive entitled to future benefits

Any individual who is retired or separated from employment covered by the plan and who is entitled to begin receiving benefits under the plan in the future. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(c) Deceased

Any deceased individual who has one or more beneficiaries who are receiving or entitled to receive benefits under the plan. This category does not include an individual if an insurance company has made an irrevocable commitment to pay all the benefits to

which the beneficiaries of that individual are entitled under the plan.

Provided that, for plan years beginning before September 2, 1975, a retiree or former employee for whom a fully paid-up immediate or deferred annuity has been purchased shall be treated as a 'participant' if such individual retains a legal claim against the plan for benefits or if the plan retains a participating interest in the annuity policy.

'PBGC' means the Pension Benefit Guaranty Corporation.

'Plan Year' means the calendar, policy or fiscal year on which the records of the plan are kept.''

''(22) The term 'normal retirement benefit' means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

(23) The term 'accrued benefit' means

(A) In the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.''